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4 UNITED STATES BANKRUPTCY COURT  
5 EASTERN DISTRICT OF CALIFORNIA  
6 SACRAMENTO DIVISION  
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10 In re ) Case No. 05-91824-A-13G  
11 MARY RAMOS, ) Docket Control No. SSA-2  
12 Debtor. ) Date: January 9, 2006  
13 ) Time: 2:00 p.m.  
\_\_\_\_\_ )

14 On January 9, 2006 at 2:00 p.m., the court considered the  
15 objection to confirmation of the Hackett 2004 Revocable Trusts.  
16 The objection was opposed by the chapter 13 debtor, Mary Ramos.  
17 The text of the final ruling appended to the minutes of the  
18 hearing follows below. This final ruling constitutes a "reasoned  
19 explanation" for the court's decision and accordingly is posted  
20 to the court's Internet site, [www.caeb.uscourts.gov](http://www.caeb.uscourts.gov), in a text-  
21 searchable format as required by the E-Government Act of 2002.  
22 The official record of this ruling remains the ruling appended to  
23 the minutes of the hearing.

24 **FINAL RULING**

25 The objection will be sustained in part.

26 The objection regarding the restitution award will be  
27 overruled. Assuming that there is a nondischargeable restitution  
28 award, the plan need not "provide for it" as the objection  
suggests. A nondischargeable claim is not necessarily a priority  
claim. See 11 U.S.C. §§ 507(a) and 1328(a). A restitution award  
is not a priority claim. Id. Only priority claims must be paid  
in full in every chapter 13 case.

1        If a claim is nondischargeable in chapter 13, there is  
2 nothing in the proposed plan that will make it dischargeable.

3        A nonpriority nondischargeable unsecured claim is entitled  
4 to be treated like every other unsecured claim. It must be paid  
5 the present value of what would be paid in a chapter 7  
6 liquidation. In this case, there is no debate that the  
7 liquidation of the debtor's nonexempt property would produce  
8 nothing for creditors in a chapter 7 liquidation. Therefore,  
9 unsecured creditors in this chapter 13 case are entitled to  
10 nothing under 11 U.S.C. § 1325(a)(4). Of course, if an unsecured  
11 claim is nondischargeable, the issuance of the discharge order at  
12 the conclusion of the case will not include that nondischargeable  
13 claim if it has not been paid (as is likely here).

14        If there is an objection under 11 U.S.C. § 1325(b),  
15 unsecured creditors may also compel the debtor to pay all  
16 disposable income into the plan for a minimum of three years.  
17 However, no one has raised the objection and if it was raised, it  
18 appears from the 48 month plan term and Schedules I and J that  
19 all disposable income is being contributed for a period in excess  
20 of 36 months. This satisfies section 1325(b).

21        The court makes no decision regarding the chapter 13  
22 dischargeability of the objecting creditor's claim because it is  
23 completely irrelevant to confirmation of the plan.

24        The objection based on 11 U.S.C. § 1322(b)(3) will also be  
25 overruled. It makes no sense. If a governmental agency holds a  
26 priority claim, it must be paid in full as required by 11 U.S.C.  
27 § 1322(a)(2), not section 1322(b)(3). The plan indicates that  
28 the priority claims of the IRS and FTB will be paid in full.

1 While the debtor has estimated those claims much lower than does  
2 the objecting creditor, the plan requires the debtor to pay the  
3 claims based on the proofs of claim filed by the governmental  
4 agencies. The plan provides:

5 "The proof of claim, not the plan or the schedules,  
6 shall determine the amount and classification of a  
7 claim. If a claim is provided for by this plan and a  
8 proof of claim is filed, dividends shall be paid based  
9 upon the proof of claim unless the granting of a  
10 valuation or a lien avoidance motion, or the sustaining  
of a claim objection, affects the amount or  
classification of the claim. Secured claims not listed  
within Classes 1, 2, 3, or 4, and priority claims not  
listed within Class 5 are not provided for by the  
plan."

11 As indicated above, the plan provides for the claims of the  
12 IRS and the FTB. If they file proofs of claim for more than is  
13 estimated, the debtor must pay the amounts demanded unless the  
14 debtor is able to successfully object to the claim. If the  
15 debtor is unable to successfully object, and the plan payments  
16 cannot feasibly pay the claims, the debtor must amend the plan on  
17 pain of dismissal. See In re Kincaid, 316 B.R. 735 (Bankr. E.D.  
18 Cal. 2004).

19 Further, whether or not the embezzlement income was included  
20 in a return, there is a substantial question whether the  
21 resulting taxes would be entitled to priority status. If a  
22 debtor files a fraudulent return or willfully attempts to evade  
23 or defeat a tax, the resulting tax is nondischargeable in a  
24 chapter 7. See 11 U.S.C. § 523(a)(1)(C). However, there is no  
25 comparable exception to the chapter 13 discharge. See 11 U.S.C.  
26 § 1328(a).

27 In a chapter 13 case, the issue is whether the tax is a  
28 priority claim and therefore must be paid in full. See 11 U.S.C.

1 § 1322(a)(2). Whether a tax is priority requires parsing the  
2 interplay between 11 U.S.C. § 507(a)(8) and 11 U.S.C. §  
3 507(a)(8). As explained in In re Savaria, 317 B.R. 395 (B.A.P.  
4 9<sup>th</sup> Cir. 2004), stale tax claims that are nondischargeable under  
5 11 U.S.C. § 523(a)(1)(B) and (C) are not also entitled to  
6 priority treatment under 11 U.S.C. § 507(a)(8). If the debtor  
7 has not filed a return, or if the return was filed late and was  
8 filed "after two years before the date of the filing of the  
9 petition," [as held in Savaria this denotes a period of  
10 indefinite duration that begins two years before the petition was  
11 filed], or if the debtor filed a false return, such taxes are  
12 nondischargeable in chapter 7 under section 523 (a)(1)(B) and  
13 (C), but are not priority taxes by virtue of section  
14 507(a)(8)(A)(iii).

15 A tax is both nondischargeable under section 523(a)(1) and  
16 entitled to priority status under section 507(a)(8)(A) only when  
17 the taxes are for a tax year ending prior to the filing of the  
18 petition for which a return is last due after three years before  
19 the filing of the petition, was assessed within 30 days of the  
20 filing of the petition, or are taxes, excluding stale taxes made  
21 nondischargeable in a chapter 7 case by section 523(a)(1)(B) or  
22 (C), that could be assessed after the filing of the petition.

23 Here, according to the objection the embezzlements occurred  
24 in 1995, 1996 and 1997. The return for 1997 was due on April 15,  
25 1998. This was more than three before the filing of the  
26 petition. To be a priority claim under section 507(a)(8)(A)(i).  
27 the return had to be due after three years before the petition.  
28 Nor where the taxes assessed within 240 days of the petition and

1 they were not the subject of an offer in compromise. Hence,  
2 section 507(a)(8)(A)(ii) does not make the taxes a priority  
3 claim. Finally, while the taxes are assessable after the filing  
4 of the petition, this is so because the debtor has allegedly  
5 failed to file returns, or filed them late, or filed fraudulent  
6 returns, or has otherwise evaded taxes. Therefore, they are  
7 excluded from priority treatment by section 507(a)(8)(A)(iii).

8 However, the court will sustain the objection under 11  
9 U.S.C. § 1325(a)(3). That is, the debtor did not propose the  
10 plan in good faith.

11 The requirement that a plan be proposed in good faith as  
12 required by 11 U.S.C. § 1325(a)(3) is frequently at issue  
13 whenever a debtor proposes to pay no dividend or a nominal one on  
14 account of a claim that would not be discharged in a chapter 7  
15 case. See In re Warren, 89 B.R. 87, 93-94 (B.A.P. 9th Cir.  
16 1988); In re Padilla, 213 B.R. 349, 352-53 (B.A.P. 9<sup>th</sup> Cir.  
17 1997). Whether such a plan is a fair use of chapter 13 or is a  
18 disguised chapter 7 that evades the discharge restrictions of 11  
19 U.S.C. § 523(a) requires the court to determine the debtor's good  
20 faith by reviewing the "totality of the circumstances." Goeb v.  
21 Heid (In re Goeb), 675 F.2d 1386, 1389-90 (9<sup>th</sup> Cir. 1982).

22 Proposing to pay no dividend or a nominal one to unsecured  
23 creditors is not necessarily bad faith. In re Goeb, 675 F.2d at  
24 1389-90; In re Warren, 89 B.R. at 92. It is only one of many  
25 factors the court may consider when reviewing the totality of  
26 circumstances surrounding a debtor's use of chapter 13. See In  
27 re Goeb, 675 F.2d at 1391; In re Warren, 89 B.R. at 92.

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1 Other factors include: 1) the amount of the proposed  
2 payments and the amount of the debtor's income surplus; 2) the  
3 debtor's employment history, ability to earn, and likelihood of  
4 future increases in income; 3) the probable or expected duration  
5 of the plan; 4) the accuracy of the plan's statements of the  
6 debts, expenses, and percentage of repayment of unsecured debt  
7 and whether any inaccuracies are an attempt to mislead the court;  
8 5) the extent of preferential treatment between classes of  
9 creditors; 6) the extent to which secured claims are modified; 7)  
10 the type of debt sought to be discharged, and whether any such  
11 debt is nondischargeable in chapter 7; 8) the existence of  
12 special circumstances such as inordinate medical expenses; 9) the  
13 frequency with which debtor has sought relief under the  
14 Bankruptcy Code; 10) the motivation and sincerity of the debtor  
15 in seeking chapter 13 relief; and 11) the burden that the plan's  
16 administration would place upon the trustee. See In re Warren,  
17 89 B.R. at 93.

18 It is incumbent on a chapter 13 debtor to prove good faith  
19 and all other requirements of confirmation. See Meyer v. Hill  
20 (In re Hill), 268 B.R. 548, 552 (B.A.P. 9<sup>th</sup> Cir. 2001). However,  
21 the court is entitled to presume the debtor's good faith in  
22 proposing a plan in the absence of a timely objection. See Fed.  
23 R. Bankr. P. 3015(f). There is no presumption of good faith here  
24 given the objection.

25 The evidence, to the extent it implicates the foregoing  
26 factors, persuades the court that this is nothing but a disguised  
27 chapter 7 case.

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1 First, while the objecting creditor's claim may or may not  
2 be wholly or partially nondischargeable in chapter 13, it is very  
3 likely nondischargeable in a chapter 7 case. The objecting  
4 creditor holds a civil judgment in the original amount of  
5 \$121,513.83. It is based on an embezzlement committed by the  
6 debtor over a three-year period. The debtor pleaded guilty to  
7 felony embezzlement and received a three-year prison sentence.  
8 There is no doubt that the foregoing conviction and judgment  
9 would translate into a nondischargeable judgment under 11 U.S.C.  
10 § 523(a)(4) and (a)(6) were the debtor to file chapter 7 and  
11 attempt to receive a discharge under that chapter.

12 Second, the plan, which is not the maximum duration of 60  
13 months, will pay nothing to general unsecured creditors. In  
14 short, as far as unsecured creditors are concerned, this case is  
15 no better than a chapter 7 liquidation. A review of the  
16 schedules reveals that general unsecured creditors would receive  
17 nothing in a chapter 7 liquidation.

18 Third, this case has no purpose other than to discharge  
19 unsecured debt, primarily the objecting creditor's debt. There  
20 are no secured claims being adjusted by the plan. Indeed, the  
21 debtor has no secured debt.

22 Fourth, the debtor's proposed plan payments are nominal,  
23 just \$100 a month. At that rate, with trustee's compensation,  
24 estimated at 10%, it will take 22 months just to pay the debtor's  
25 attorney. For the remaining 26 months, the plan will pay a  
26 relatively minor income tax liability, approximately \$3,500.

27 Fifth, a review of Schedule I (both the original and the  
28 amended Schedule I) reveals that the debtor is earning a mere

1 \$861.33 in monthly net income. The debtor is also projecting no  
2 increase in disposable income for the foreseeable future. Over  
3 the last two years, as indicated in the Statement of Financial  
4 Affairs, the debtor never had annual income in excess of \$7,400.  
5 Schedules A and B reveal no substantial assets and none that the  
6 debtor cannot exempt. In short, the debtor was, is, and will  
7 continue to be, judgment proof. There was no financial need to  
8 file a petition under any chapter.

9 For instance, the only potential target for collection of  
10 the objecting creditor's judgment is the debtor monthly income.  
11 However, no more than 25% of judgment debtor's earnings may be  
12 garnished. See Cal. Civ. Proc. Code § 704.070. However, even  
13 the 25% of garnishable wages can be exempted if necessary to the  
14 debtor's subsistence. See Cal. Civ. Proc. Code § 706.51. That  
15 would be an easy burden for the debtor to meet. Schedule J lists  
16 the debtor's monthly expenses. If anything, it is difficult to  
17 believe they are as low as they have been listed. At any rate,  
18 the debtor would likely have no trouble convincing a state court  
19 that she needed all of her net earned income to pay her ordinary  
20 and necessary living expenses.

21 If the debtor has nothing to lose by not filing a petition,  
22 why was this petition filed. Certainly not to reorganize. If  
23 she has been honest with the court about her assets, income, and  
24 expenses, she will lose nothing outside of this court. It seems  
25 clear, then, that is nothing but a disguised chapter 7.

26 Sixth, as just noted, it is difficult to believe that the  
27 debtor's real monthly expenses are the Spartan expenses listed on  
28 Schedule J. It seems clear to the court that the debtor is



1 somehow being subsidized by family or friends. If this  
2 incorrect, then the court concludes that the plan is not  
3 feasible. The debtor's expenses are likely higher than projected  
4 and she will be unable to maintain even the nominal monthly  
5 payment of \$100. If the court's inference about being subsidized  
6 is correct, then the debtor has failed to list this additional  
7 income on Schedule I.

8       Seventh, even though the debtor has admitted to the  
9 embezzlement, she purports to not know its amount. The court  
10 does not believe the debtor. She knows. And, she also knows she  
11 owes income taxes on the amount embezzled. Yet, she proposes to  
12 do nothing about amending her returns to determine that  
13 liability. She claims it is just too difficult. If it too  
14 difficult, it is her own doing. The court will not lend its  
15 processes to someone who is not completely candid and is evading  
16 taxes.

17       The court has not discussed each and every Warren factor.  
18 It is not required to do so. It has, however, considered the  
19 totality of the circumstances and it concludes that this plan has  
20 not been proposed in good faith as required by 11 U.S.C. §  
21 1325(a)(3).